Filed 7/9/12 In re W.W. CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Calaveras)

In re W.W., a Person Coming Under the Juvenile Court Law.	
CALAVERAS COUNTY WORKS AND HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. D.W. et al., Defendants and Appellants.	C069374 (Super. Ct. No. 10JD5070)

Dale W. (father) and Shannon S. (mother), parents of minor W.W. (minor), appeal from orders of the juvenile court terminating their parental rights. (Welf. & Inst. Code,[1] §§ 366.26, 395.) Both parents contend the beneficial parental relationship and relative placement exceptions to adoption

[1] Further undesignated statutory references are to the Welfare and Institutions Code.

applied to minor's case to defeat termination of their parental rights. They also challenge the adequacy of notice pursuant to the Indian Child Welfare Act (ICWA). (25 U.S.C. § 1901 et seq.) Mother further asserts that the court erred in failing to hear her *Marsden* motion.[2]

We agree only with the parents' claim of error under the ICWA's noticing requirements. Our limited agreement, however, requires us to conditionally reverse for compliance with the ICWA.

FACTUAL AND PROCEDURAL BACKGROUND

Preliminary Proceedings

In August 2010, Calaveras County Works and Human Services Agency (the Agency) detained minor, born in September 2007, after law enforcement repeatedly found him filthy and wandering in the road significant distances from home. Father blamed a nine-year-old half sibling for not locking the door.[3]

At the detention hearing, mother claimed Cherokee heritage and father claimed Comanche heritage. The Agency sent notice of the proceedings only to the Cherokee tribes, erroneously indicating that father claimed Cherokee heritage. This notice contained little ancestral information.

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[2] *People* v. *Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

[3] The half sibling was also removed and placed with her father; she is not involved in this appeal.

By the time of the jurisdiction hearing, minor was placed with the paternal grandmother. The Agency reported that the parents were not taking minor's wandering seriously, and also reported the possibility that the parents were abusing prescription drugs. After a contested jurisdiction hearing, the juvenile court sustained the petition.

The disposition report recommended services for the parents. The report stated minor was well bonded to the parents and his half sibling and had trouble separating from them, but the paternal grandmother was able to comfort him quickly. The visits were supervised. At the disposition hearing, the court adopted the recommendation, ordered services, and set a review hearing.

Six-Month Review Hearing

The review report revealed that the Cherokee Nation had contacted the Agency seeking additional ancestor information. However, the parents had minimal contact with the Agency, and it had been unable to secure the requested information. Eventually, the Agency obtained additional information from mother and sent new notice to the tribe.

The Agency reported the parents made minimal progress on the case plan and had been arrested for child endangerment; mother was also facing drug charges, and the parents were homeless. Minor remained placed with the paternal grandmother and was doing well. The parents had difficulty demonstrating consistent parenting skills in that they were late or cancelled visits although they were appropriate during visits.

Consequently, after October 2010, visits were decreased to biweekly and supervised at Agency offices rather than by the paternal grandmother. The parents missed the first scheduled visit and failed to contact the Agency for visits until December 2010. The parents were late for their first visit, but did attend the next two, which went well. Visitation was suspended in February until the parents met with the Agency about their case plan progress and outstanding warrants.

Minor was happy to see his parents at visits; however, he was not overly disturbed when visits ended or when his parents failed to visit. The parents' telephone contact with minor was also inconsistent; they did not call more than once a week. The report recommended termination of services because the parents had made minimal progress on the case plan. The court adopted the recommendation, terminated services and set a section 366.26 hearing.

Events Pending the Section 366.26 Hearing

The Agency sent the June 2011, ICWA notice of the July 2011 section 366.26 hearing only to the Cherokee Nation. The notice included names and birthdates for the maternal and paternal grandmothers and one maternal and one paternal great-grandmother, but no other information. The notice did not reference father's claim of Comanche heritage. No notice was sent to the Comanche tribe.

In June 2011, the California Department of Social Services (DSS) filed an adoption assessment informing the Agency that the current caretakers, the paternal grandparents, felt it was in

minor's best interest to be adopted by a younger family because the grandparents were beginning to develop age-related health problems which would make long-term care difficult for them. They did want to "remain a part of [minor's] life," but did not wish to adopt him.

The parents' visitation had been sporadic and was currently set at once a month. DSS had begun a search for an adoptive family. The maternal grandmother and the maternal great-grandmother had been assessed for placement and found unsuitable. DSS had located over 20 families interested in adopting minor and recommended termination of parental rights.

The Agency sent another ICWA notice of the proceedings on June 14, 2011--for the first time referencing the Comanche tribe. The notice was sent only to the Comanche tribe and, aside from including the information that father claimed Comanche heritage, contained only the information sent in the previous notice to the Cherokee Nation.

The Agency's report prepared for the section 366.26 hearing recommended termination of parental rights. Minor was three years old and healthy with no developmental or behavioral issues. The report reiterated the information in the DSS adoption assessment and discussed the overall lack of visitation between minor, his parents, and half sibling. The parents visited monthly after services were terminated, but father had to be reprimanded for expressing hostility toward the social worker and discussing the case in front of minor. Letters from the Cherokee and Comanche Nations, attached to the report,

indicated that minor was not eligible for tribal membership based on the information in the notices.

Section 366.26 Hearing:

Mother's Dissatisfaction with Counsel

At the section 366.26 hearing held in August 2011, counsel for mother told the juvenile court mother was dissatisfied. Mother then addressed the court, stating that the case had not been "heard properly" and asking for a "recess" because she was "confused right now because of some things that were just brought to light just immediately." The court asked if she wanted the matter set for hearing; mother agreed that was what she wanted. The court set a contested hearing and a readiness conference, ordering the parents to appear at both hearings.

Neither parent appeared at the readiness conference and the contested hearing date was confirmed.

The contested section 366.26 hearing commenced September 14, 2011. Counsel for mother said his client had just told him she did not feel she was properly represented and he interpreted her dissatisfaction as a *Marsden* motion. Although the court viewed the oral motion as an attempt to delay the proceedings, it nonetheless invited mother to speak. Mother voiced her concern that, "We have not been represented properly through this whole thing." After a brief exchange with mother, the court took judicial notice of the entire file. Opining that it saw no reason why any attorney in the case should be removed, it denied what it interpreted as mother's request to delay the hearing to have the court appoint new counsel.

Discussions with the Paternal Grandmother

The hearing resumed with testimony from the DSS adoptions specialist that minor was adoptable and a prospective adoptive family had been identified. The adoptions specialist testified she had discussed the long-term alternatives with the paternal grandmother, who wanted to know if it was possible to find a family to adopt minor. The paternal grandmother did not want to raise minor herself either in guardianship or adoption but wanted to maintain contact with him. The adoptions worker said she had explained that adoptive parents could change their minds about contact. She was prepared to discuss all alternatives with the paternal grandmother but the paternal grandmother said she felt unable to provide long-term care to minor. Nonetheless, the adoptions worker did superficially discuss the long-term options but did not leave any literature because the paternal grandmother did not want it.

The Agency also talked to the paternal grandmother about her interest in adoption or guardianship. The paternal grandmother did not think she was able to care for minor long-term because of his activity level and her health issues and was not interested in either alternative.

Minor's Relationship with Parents

The social worker testified minor was close to his parents and had difficulty separating from them for a while but, as visits had decreased in frequency he was having less difficulty. At the last visit, when his parents failed to arrive, minor did not cry or ask for them.

Mother testified she believed there was a benefit to minor in continuing their relationship. She felt that termination of parental rights would be detrimental to minor. She agreed she had recently pleaded guilty to possession of methamphetamine pursuant to proposition 36, but said she was innocent and was appealing the conviction.

Father testified about the quality of visits with minor and also believed minor should have continuing contact with him.

Adoption by the Paternal Grandmother

The paternal grandmother testified minor had been in her care over a year. She said minor was excited to go to parental visits, but he was very quiet afterwards although she was able to distract him. She said relative guardianship was suggested to her by mother's attorney and if the court decided it was the appropriate plan, she would do it. However, as she had explained to the social worker and the adoptions worker, she did not feel she could care for minor long-term either through adoption or guardianship because she split her time between two different homes caring for her mother and her adoptive father. She did want to maintain contact with minor.

The Court's Decision

In a written decision issued the day after the hearing, the court found and ruled as follows: The parents were ordered to appear at the readiness hearing but failed to do so and the *Marsden* motion was untimely; there was clear and convincing evidence minor was likely to be adopted; the paternal grandmother was neither willing to nor capable of providing a

stable and permanent environment through guardianship; there was insufficient evidence to find adoption would interfere with a sibling relationship; and the parents did not show that the strength and quality of their relationship with minor outweighed the security and sense of belonging that a new family would offer him. The court terminated parental rights and freed minor for adoption.

DISCUSSION

I

Beneficial Parental Relationship Exception

The parents first contend the juvenile court erred by failing to apply the beneficial parental relationship exception to adoption and thus avoid terminating their parental rights.

A. The Law

"'At the selection and implementation hearing held pursuant to section 366.26, a juvenile court must make one of four possible alternative permanent plans for a minor child. . . . *The permanent plan preferred by the Legislature is adoption*. [Citation.]' [Citations.] If the court finds the child is adoptable, it *must* terminate parental rights absent circumstances under which it would be detrimental to the child." (*In re Ronell A.* (1996) 44 Cal.App.4th 1352, 1368.)

There are only limited circumstances permitting the court to find a "compelling reason for determining that termination [of parental rights] would be detrimental to the child." (§ 366.26, subd. (c)(1)(B).) One of these is where the parent has maintained regular visitation and contact with the child *and*

the *child would benefit* from continuing the relationship, often referred to as the beneficial parental relationship exception. (§ 366.26, subd. (c)(1)(B)(i).) The "benefit" to the child must promote "the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575 (*Autumn H.*); *In re C.F.* (2011) 193 Cal.App.4th 549, 555 (*C.F.*).) Even frequent and loving contact is not sufficient to establish this benefit absent a *significant, positive, emotional attachment* between parent and child. (*C.F.*, *supra*, 193 Cal.App.4th at p. 555; *Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.)

"Because a section 366.26 hearing occurs only after the court has repeatedly found the parent unable to meet the child's needs, it is only in an extraordinary case that preservation of the parent's rights will prevail over the Legislature's preference for adoptive placement." (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350 (*Jasmine D.*).)

B. Burden and Standard of Review

The party claiming the exception has the burden of establishing the existence of any circumstances which constitute an exception to termination of parental rights. (*C.F.*, *supra*, 193 Cal.App.4th at p. 553.)

As the parent must establish the existence of the factual predicate of the exception--that is, evidence of the claimed beneficial parental relationship--and the juvenile court must then *weigh* the evidence and determine whether it constitutes a compelling reason for determining detriment, substantial evidence must support the factual predicate of the exception, but the juvenile court exercises its discretion in weighing that evidence and determining detriment. (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314-1315 (*Bailey J.*).) "On review of the sufficiency of the evidence, we presume in favor of the order, considering the evidence in the light most favorable to the prevailing party, giving the prevailing party the benefit of every reasonable inference and resolving all conflicts in support of the order." (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 576.) "'[E]valuating the factual basis for an exercise of discretion is similar to analyzing the sufficiency of the evidence for the ruling. . . . Broad deference must be shown to the trial judge.'" (*Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1351.)[4]

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[4] We acknowledge the parties' discussion in their respective briefing regarding the split of authority as to whether the

C. Analysis

In this case, the parents, except for a brief period of monthly visits, did not maintain regular visitation. That fact alone is enough to defeat the applicability of the exception. However, even assuming regular visitation, they failed to meet their burden.

Although it was clear minor's parents loved him and that he had positive feelings for them, their behavior, including missing visits and inability to satisfactorily complete their services, demonstrated that they were more focused on their own needs than on minor's. The case began when minor was left to wander unwashed and uncared for; neither parent was aware of his whereabouts, let alone his needs. The parents did visit when scheduled to do so, apparently indifferent to the effect this would have on minor, and when they did attend visits, behaved immaturely. The juvenile court did not abuse its discretion by concluding that the benefit to minor of continued contact with his parents was outweighed by the security and the sense of belonging a new family would confer on him.

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substantial evidence standard, the abuse of discretion standard, or a hybrid standard applies in reviewing the juvenile court's rejection of exceptions to adoption. We shall apply the hybrid standard, but note that "[t]he practical differences between the two standards are not significant" in this context. (*Jasmine D., supra,* 78 Cal.App.4th at p. 1351.)

II

Relative Placement Exception

The parents further contend the juvenile court erred by failing to apply the relative placement exception to adoption.

A. The Law

A second exception to adoption is found where "[t]he child is living with a relative who is unable or unwilling to adopt the child because of circumstances that do not include an unwillingness to accept legal or financial responsibility for the child, but who is willing and capable of providing the child with a stable and permanent environment through legal guardianship, and the removal of the child from the custody of his or her relative would be detrimental to the emotional well-being of the child." (§ 366.26, subd. (c)(1)(A).)

This exception permits the court to order guardianship if the relative is willing and capable of providing a stable permanent home and removal from the relative would be detrimental to the emotional well-being of minor. We explained the applicable the burden of proof and standard of review in Part I, *ante*. Here, again, the parents cannot establish either element of the exception.

B. Analysis

The paternal grandmother made it clear that she did not feel able to provide long-term care for minor because she was caring for aged parents and because of her own health. She believed the best solution for minor was adoption by a younger family. She was told of the guardianship alternative by both

the social worker and the adoptions worker but rejected it. There was no evidence that separation from the paternal grandmother would be sufficiently detrimental to minor's emotional well-being as to outweigh the benefits of a permanent and stable adoptive home. The juvenile court correctly concluded the relative placement exception to adoption did not apply.

III

ICWA

The parents next contend that the notices sent to the tribes did not comply with the requirements of the ICWA. The Agency responds that any error was harmless. We agree with the parents that remand is required.

The ICWA protects the interests of Indian children and promotes the stability and security of Indian tribes by establishing minimum standards for, and permitting tribal participation in, dependency actions. (25 U.S.C. §§ 1901, 1902, 1903(1), 1911(c), 1912.) The juvenile court and the Agency have an affirmative duty to inquire at the outset of the proceedings whether a child who is subject to the proceedings is, or may be, an Indian child. (Cal. Rules of Court, rule 5.481(a).) If, after the petition is filed, the court "knows or has reason to know that an Indian child is involved," notice of the pending proceeding and the right to intervene must be sent to the tribe or the Bureau of Indian Affairs (BIA) if the tribal affiliation is not known. (25 U.S.C. § 1912; § 224.2; Cal. Rules of Court, rule 5.481(b).) Failure to comply with the notice provisions

and determine whether the ICWA applies is prejudicial error. (*In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1424; *In re Desiree F.* (2000) 83 Cal.App.4th 460, 472.)

State statutes, federal regulations and the federal guidelines on Indian child custody proceedings all specify the contents of the notice to be sent to the tribe in order to inform the tribe of the proceedings and assist the tribe in determining if the child is a member or eligible for membership. (§ 224.2; 25 C.F.R. § 23.11(a), (d), (e); 44 Fed.Reg. 67588 No. 228, B.5 (Nov. 26, 1979).) If known, the Agency should provide name and date of birth of the child; the tribe in which membership is claimed; the names, birthdates, and places of birth and death, current addresses and tribal enrollment numbers of the parents, grandparents and great grandparents as this information will assist the tribe in making its determination of whether the child is eligible for membership and whether to intervene. (§ 224.2; 25 C.F.R. § 23.11(a), (d), (e); 44 Fed.Reg. 67588 No. 228, B.5 (Nov. 26, 1979); *In re D.T.* (2003) 113 Cal.App.4th 1449, 1454-1455.)

Here, mother claimed only Cherokee heritage, father only Comanche. The early notices were clearly inadequate. While the last two notices included *some* additional ancestor names and birthdates, there were no current addresses, places of birth or death or correct designation of the tribal ancestry claimed. The Agency, while not required to "cast about" trying to find relatives with information, was in contact with both paternal and maternal grandparents and could easily have made the

necessary inquiry to fill the gaps. (Cal. Rules of Court, rule 5.481(4)(A); *In re Levi U.* (2000) 78 Cal.App.4th 191, 199.) Further, including all relevant information in the possession of the Agency, e.g., that ancestry is claimed only through a particular relative or that the family declines to provide further information, can explain the lack of some information enabling both the tribe and the appellate court to review the notice. Finally, the corrected notices were sent only to the Cherokee Nation and the Comanche Nation. The additional information should also have been sent to the remaining Cherokee tribes. (*In re C.B.* (2010) 190 Cal.App.4th 102, 140; § 224.2, subd. (a)(3).)

IV

Mother's Marsden Motion

Mother next argues the juvenile court erred in failing to hear her *Marsden* motion. We are not persuaded.

In a criminal case, when a defendant requests substitute counsel, the trial court must permit the defendant to explain the specific reasons why the defendant believes current counsel is not adequately representing him. (*Marsden*, *supra*, 2 Cal.3d at pp. 123-124.) The court need not grant the request for substitution of counsel absent a showing that denial would substantially impair the parent's right to the assistance of counsel. (*Marsden*, *supra*, at p. 123; *People v. Turner* (1992) 7 Cal.App.4th 913, 917.) However, denial of the opportunity to explain constitutes an abuse of discretion. (*Marsden*, *supra*, at pp. 123-124.)

Substitute counsel should be appointed when, in the exercise of the court's discretion, the court finds either that counsel is not providing adequate representation or there is such an irreconcilable conflict between the client and counsel that ineffective representation is likely to result. (*People v. Smith* (1993) 6 Cal.4th 684, 696.) Disagreement on trial tactics does not necessarily compel appointment of new counsel. (*People v. Williams* 1970) 2 Cal.3d 894, 905.)

The court's duty to permit a person represented by appointed counsel to state the reasons for dissatisfaction with counsel only arises when the person in some manner moves to discharge his current counsel. There must be, at the very least, some *clear indication by the individual* that he wants a substitute attorney. (*People v. Freeman* (1994) 8 Cal. 4th 450, 480-481; *People v. Lucky* (1988) 45 Cal.3d 259, 281, fn. 8.)

In a dependency proceeding, the parents have a statutory and a due process right to competent counsel. (§ 317.5; *In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1153 fn. 6.) Juvenile courts, relying on the *Marsden* model, have permitted parents to air their complaints about appointed counsel and request new counsel be appointed. An exhaustive *Marsden* hearing is not required in a dependency action. It is only necessary that the juvenile court "make *some* inquiry into the nature of the complaints against the attorney." (*In re James S.* (1991) 227 Cal.App.3d 930, 935, fn. 13 [original emphasis].)

The initial section 366.26 hearing in August 2011 was the first time mother addressed the court after her counsel first

suggested she might want to bring a *Marsden* motion the month before. At no time did mother tell the court she wanted new counsel. When the court interpreted her statement as a desire for a contested hearing, mother agreed. The prophylactic *Marsden* procedures were not triggered at the August 2011 hearing.

Mother did not appear at the readiness hearing and so made no requests. When she appeared at the contested hearing on September 14, 2011, she claimed she had not been represented properly but did *not* clearly indicate she wanted substitute counsel. She did not make any effort to substantiate her vague claim of inadequate representation, nor do we see any evidence of an irreconcilable conflict. The juvenile court did not abuse its discretion in denying the *Marsden* motion on this ground.

In its written ruling the juvenile court found the *Marsden* motion was untimely. While a *Marsden* motion may be brought at any time, "'[i]t is within the trial court's discretion to deny a motion to substitute made on the eve of trial where substitution would require a continuance.' [Citation.]" (*People v. Smith* (2003) 30 Cal.4th 581, 607.) By the time of the hearing, minor had been a dependent for over two years, during which time mother made little effort to reunify with him or even to visit him. After the trial court set a contested hearing at her request, she failed to appear at the readiness conference without explanation. She then appeared at the hearing and could

not articulate why her situation merited a substitution of appointed counsel. Under the circumstances, we find no abuse of discretion by the juvenile court in denying the motion on this additional ground.

Finally, mother argues the court erred in failing to hold its limited *Marsden* inquiry in a closed proceeding. But the law does not require that a *Marsden* hearing necessarily be closed, even in a criminal case, particularly when mother did not request a closed hearing and no information disclosed during the court's limited inquiry provided any advantage to the Agency in ongoing litigation. (*People v. Lopez* (2008) 168 Cal.App.4th 801, 814-815; *People v. Madrid* (1985) 168 Cal.App.3d 14, 18-19.) No error appears.

DISPOSITION

The orders terminating parental rights are reversed and the matter is remanded for the limited purpose of permitting the Agency to comply with the notice provisions of the ICWA. The Agency is directed to make any necessary inquiry and promptly comply with the notice provisions of the ICWA. Thereafter, if there is no response or if the tribes determine minor is not an Indian child, the orders shall be reinstated. However, if a tribe determines minor is an Indian child and the court determines the ICWA applies to this case, the juvenile court is

ordered to conduct a new section 366.26 hearing in conformance with all provisions of the ICWA.

DUARTE, J.

We concur:

BLEASE, Acting P. J.

HULL, J.